Supreme Court, U.S.
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IN THE
Supreme Court of the United States

CAROL RINEHART

Petitioner,

v.

DAVID SCHMIDT, GUARDIAN
Respondent,

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR MONTGOMERY COUNTY OHIO

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an adult incompetent for whom a guardian of the person has been appointed still retains, under the Due Process Clause of the Fourteenth Amendment of the United States Constitution the right to independent representation of Counsel.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
TABLE OF AUTHORITIES	3
OPINIONS BELOW	4
JURISDICTION	4
CONSTITUTIONAL PROVISIONS INVOLVED	4
STATEMENT	4
REASONS FOR GRANTING THE PETITION	6
CONCLUSION	12

TABLE OF AUTHORITIES

Page(s)

Cases:

In Re Gault, 387 U.S. 1 (1967) 8

Guardianship of Lon Hocker, 439 Mass. 709; 791 N.E. 2d 302 (2003) 8, 10

Kent vs. U.S. 383 U.S. 541 (1966) 10

O'Connor v. Donaldson, 422 U.S. 563 (1975) 7

Parham v. J. R., 442 U.S. 584 (1979) 7

In Re Guardianship of Willis, 74 Ohio App 3d554 (1991) 9

Zinerman v. Burch, 494 U.S. 113 (1990) 7

PETITION FOR WRIT OF CERTIORATRI

Other Authorities:

2001 H. H. S. C. Guardianship Advisory Board Report on the Development of Statewide Guardianship System for Texas, December 15, 2001 11

Breggin, Peter, Toxic Psychiatry, 1991 New York: St. Martin's Press and Your Drug May Be Your Problem, Da Capo Press 2000 11

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion and order of both the Court of Appeals of Montgomery County, Ohio and the Probate Court of Montgomery County, Ohio are unreported.

JURISDICTION

The Judgment of the Court of Appeals of Montgomery County, Ohio was entered on December 30, 2004; the Judgment of the Supreme Court of Ohio declining jurisdiction was entered on May 25, 2005; the reconsideration Entry of the Supreme Court of Ohio denying the motion for reconsideration was entered on August 10, 2005. An Order granting an extension of time to file the Petition for Writ of Certiorari was filed on Oct. 27, 2005. This Court has jurisdiction under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution states in relevant part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT

Petitioner, a fifty-nine year old lady, had a history of seizures resulting from Spinal Meningitis at the age of four. The meningitis also caused her to be almost totally deaf. As result of the deafness, here speech was extremely difficult to understand and communication was difficult if not

impossible. Her parents were both deceased and she had no family. She had virtually no friends.

In this state of affairs, she had a seizure; was hospitalized; and for the first time had a psychiatric evaluation. As a result of the evaluation, an application was filed in the Probate Court of Montgomery County, Ohio to have her adjudicated incompetent and to appoint a guardian of her person.

Since an independent psychiatric evaluation found a guardianship necessary, the initial resistance to the guardianship was withdrawn. Therefore, Petitioner was adjudicated incompetent and Respondent was appointed Guardian of her person. Several days later, when Petitioner's Counsel attempted to contact Petitioner, the Guardian refused and has since that time, continuously refused to allow Counsel to see or consult with the Petitioner.

Shortly after Counsel was refused the right to see or consult with Petitioner, Counsel filed on Petitioner's behalf a Motion to See and Consult with Petitioner. That Motion was denied in the trial court and the appellate court affirmed the denial. Questions were raised at the trial level as to the appropriateness of this Counsel representing Petitioner. In fact, Counsel had been representing Petitioner for over ten years; see Magistrate's Hearing of 3/18/03 Tr. 3 and Judge's Hearing of 2/09/04 Tr. 12. Because of the extent of this Counsel's professional relationship with Petitioner and his knowledge of her affairs, the independent psychiatric evaluation showed that the psychiatrist relied, to a great extent, upon information from Counsel in making the evaluation. Furthermore, if there were any question concerning the suitability of this particular Counsel representing Petitioner, that issue should have been put to rest since, in the Hearing before the Trial Judge, Counsel

made it clear he was seeking, in the alternative, the appointment of other Counsel who was independent of the Guardian, see Judge's Hearing of 2/09/04 Tr. 17.

The issue of the Constitutional Right to Counsel was raised throughout these various proceedings starting with the Trial Court, the Appellate Court, and finally in the Supreme Court of Ohio. See, The Decision and Order of the Trial Court at page 2 and The Opinion of the Court of Appeals in the Appendix hereto. Furthermore, this issue was raised in Petitioner's Brief filed in the Court of Appeals as well as in Petitioner's Motion In Support Of Jurisdiction filed in the Ohio Supreme Court.

While stating that they recognized Petitioner's right to independent representation of Counsel, both the Trial Court and the Court of Appeals failed to recognize that right. On the contrary, it was the opinion of these courts that either the Guardian himself, or an attorney selected by the Guardian would sufficiently protect Petitioner's rights. The following statement from the Opinion of the Court of Appeals demonstrates some of the reasoning involved:

> ". . . In sum Gilbert's argument that Rinehart should be allowed to employ an attorney of her own choice based on her current views or of past decisions is inconsistent with the concepts of incompetence and guardianship . . . "

We believe that any such concepts of incompetence and guardianship must give way to the due process right to Counsel as guaranteed by the Fourteenth Amendment to the United States Constitution.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Conflicts, In Principle, With Previous Decisions of This Court.

The question presented raises the issue of whether there is a continuing right to the independent representation of Counsel after an adjudication of incompetency and the appointment of a guardian of the person. Does the Due Process Clause guarantee this right?

In various situations this Court has protected the liberty interest of individuals alleged to be mentally ill as well as the liberty interest of minors. It is hard to imagine a more valued liberty interest than the Right to Counsel. It should be obvious that the Right to Counsel is the foundation of all other rights protected by the liberty interest.

An individual for whom a Guardian of the person has been appointed is virtually in the identical position that a child is in, in his relationship with his parents! He has no freedom of choice and no freedom of movement and is totally under the control of the parent and in this case the Guardian. The most simple and fundamental things that one does in his life cannot be done without the approval of the Guardian. The Ward cannot even decide to take a walk or visit a friend or even decide what clothes to wear if the Guardian should disapprove. Because of the profound invasion of the Ward's civil rights and civil liberties it should be obvious that basic constitutional guarantees must be provided. Of all the basic constitutional guarantees, it is hard to imagine one that is more fundamental than the right of the Ward to an independent selection and choice of Counsel. This Court has ruled that individuals subjected to probate Commitment Proceedings are entitled to due process protection. In Parham v. J. R. 442 U.S. 584 (1979) this

Court ruled that a juvenile who had been committed, was entitled to periodic review of the necessity for his continued commitment. Because of the profound impact of an adjudication of incompetence and the appointment of a guardian of the person, we maintain that the need for due process protection are at least as great here as in the commitment situation. In Zinermon v. Burch, 494 U.S. 113 (1990) this Court ruled that one who had been a voluntary mental patient could maintain a section 1983 action against the hospital staff for failing to ensure either informed consent (upon admission) or provide, in the alternative, an involuntary judicial commitment proceeding. In O'Connor v. Donaldson, 422 U.S. 563 (1975) this Court ruled that a mental patient who had been confined for fifteen years, could maintain a Section 1983 action against hospital staff when the patient was non-dangerous and capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends. As the Court stated in Zinermon at page 131

> ". . . . Petitioners do not seriously dispute that there is a substantial liberty interest in avoiding confinement in a mental hospital." See Vitek v. Jones, 445 U.S. 480, 491-492 (1980) (commitment to Mental Hospital entails, "a massive curtailment of liberty," and requires due process protection); Parham v. J. R., 442 U.S., at 600 (there is a "substantial liberty interest in not being confined unnecessarily for medical treatment"); Addington v. Texas, 441 U.S. 418, 425 [***118] (1979) ("HN12 Civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection");

If a mental patient's liberty interest under the due process clause entitles him to these protections, then in principle, at

least as much protection should be provided to one who has been adjudicated incompetent and placed under the guardianship of his person.

Similarly, this Court in In re. Gault 387 U.S. 1 (1967) and Kent v. U.S. 383 U.S. 541 (1966), this Court has protected the rights of juveniles where it was claimed that juvenile court procedures invalidated liberty interests under the Due Process Clause. These juvenile court cases are of particular interest since the rationale for the juvenile procedures is the doctrine of *ParensPatriae*. Traditionally, the same rationale has motivated probate court guardianship procedures. If Due Process rights must be recognized for juveniles in the juvenile court system, why should they not also be recognized here?

For an indefinite period of time into the future and possibly for the rest of her life, this Petitioner, as well as others like her, will have their freedom profoundly curtailed without any opportunity on their own, to question, challenge or otherwise review the reasonableness of their status. Furthermore, over and above questioning their status, they are unable to assert any of the rights (independent of the question of their status). e.g., the right to sue for personal injury, property damage, etc., etc. Ohio courts have held that they cannot even question the propriety of being forcibly medicated since the guardian has absolute power in that area, In Re. Guardianship of Willis, 74 Ohio App 3d 544 (1991).

II. The Question Presented Is Of Exceptional Importance And Requires This Court's Intervention.

The appointments of guardians for adult incompetents are becoming increasingly prevalent, see 2001 H.H.S.C.

Guardianship Advisory Board Report in the Development of Statewide Guardianship System for Texas, Dec. 15, 2001. Furthermore, courts continue to fail to recognize the right to counsel after adjudication, Cf. *Guardianshsip of Lon Hocker*, 439 Mass. 709; 791 N.E.2d 302 (2003).

The language used by the Trial Court and the Appellate Court below belie the fact that probate courts assume that with the appointment of a guardian of the person a ward has no remaining civil rights and civil liberties and his life is totally at the mercy of the guardian. Such a situation presents a various serious problem and a problem of national importance when the ruling is contrasted with this court's precedents relating to mentally ill individuals and juveniles. For all practical purposes, the effect of an adjudication of incompetency and an appointment of a guardian of the person is to "throw away the keys" on the incompetent, for the rest his life. In fact, the effect is worse than imprisoning a criminal for life, because even one in prison for life has access to Counsel to pursue not only questions concerning his continued incarceration but questions concerning numerous other matters which in various ways affect his legal rights, e.g., the Right to Sue custodians for improper treatment, the Right to Sue physicians for malpractice, the Right to Sue the state for unsanitary conditions at a prison, etc., etc. If the rulings below are correct, incompetent wards such as Petitioner's have no right to counsel whatsoever. Even their right to be restored to competency and to seek a termination of their guardianship is rendered meaningless since they are completely at the whim and comprice of the guardian in all matters. Suppose the guardian become dysfunctional or becomes negligent or harsh or abusive. Certainly we cannot say that the guardian can decide when counsel is needed because a guardian engaging in misconduct is hardly likely to ask that an attorney be employed to investigate his own misconduct. An adjudication of incompetence and the

appointment of a guardian of the person does not by some magical incantation protect incompetent wards from all species of harm that may befall them.

Nor is it reasonable to say that since no specific injury can be documented no intervention is justified and no problem of national importance exists. Obviously, as long as courts can cut off access to counsel, no one will ever know whether and when incompetent wards are being injured. A guardian is not a czar over the life of an incompetent. As Justice Fortes stated in Kent v. U.S. 383 U.S. 541; 86 S. Ct. 1045 at page 1049 of 86 S. Ct.

> . . . The admonition to function in a parental relationship is not an invitation to procedural arbitrariness . . .

III. The Decision Below Is Wrong On The Merits.

The statements made by the lower courts in this matter that, in substance, everyone agrees that Petitioner is entitled to the independent representation of counsel are transparent. Similarly, the idea that the courts will somehow know when the circumstances require counsel is without foundation. Obviously, the court has no independent means of knowing the ward's status and even if there were some independent investigation, that would not replace the protections afforded by independent counsel who's purposes would be to protect the rights of the ward from the ward's point of view. Courts can state, as these lower courts have stated, that one is entitled to the independent representation of counsel, but what possible value can those statements contain when a simple request to see and consult the ward is denied as is a request to have other or different counsel perform the same function.